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TRADESHIFT, INC.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

12 || TRADESHIFT, INC., a Delaware corporation,

Case No. 3:20-cv-1294-RS

13 Plaintiff,

**PLAINTIFF TRADESHIFT, INC.'S
NOTICE OF MOTION AND
CONTINGENT MOTION FOR LEAVE
TO FILE FIRST AMENDED
COMPLAINT**

14 | v.
15 BUYEROQUEST, INC., an Ohio corporation.

Dept: 3 - 17TH FLOOR
Judge: The Hon. Richard Seeborg
Date: August 12
Time: 1:30 pm

16 || Defendant.

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PLAINTIFF'S CONTINGENT
MTN FOR LEAVE TO FILE
FIRST AMENDED COMPLAINT
CASE No. 3:20-cv-1294-RS

NOTICE OF MOTION AND MOTION

PLEASE TAKE NOTICE that on August 12, 2021 at 1:30 pm in Courtroom 3, 17th Floor, located at the San Francisco Courthouse, 450 Golden Gate Ave., San Francisco, CA 94102, Plaintiff Tradeshift, Inc. (“Plaintiff” or “Tradeshift”) will and hereby does move this Court for leave to file a First Amended Complaint. A copy of Tradeshift’s proposed First Amended Complaint is attached hereto as Exhibit A.

Defendant brings this Motion pursuant to Federal Rule of Civil Procedure 15(a)(2) and Civil Local Rule 10-1. This Motion is based on this Notice, Memorandum of Points and Authorities, the Declaration of Jason Yu and exhibits thereto, the record in this case (including the Court's May 25, 2021 order ("the Discovery Order") (ECF 94) and Tradeshift's Motion for Relief (ECF 104) and any order issued as a result), oral argument as permitted by the Court, and any other matters that the Court deems appropriate.

Dated: July 1, 2021

/s/ Amy K. Van Zant

AMY K. VAN ZANT
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Attorneys for Plaintiff
TRADESHIFT, INC.

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1 **I. INTRODUCTION**

2 Tradeshift requests that the Court grant this Motion for Leave to file its First Amended
 3 Complaint (attached as Exhibit A),¹ which adds only two new paragraphs and no new claims.
 4 Consideration of this Motion for Leave is only necessary if the Court denies Tradeshift's pending
 5 Motion for Relief from Non-dispositive Pretrial Order (ECF 104) on the grounds that Tradeshift
 6 has not pled sufficient allegations in the current Complaint or otherwise adequately disclosed its
 7 claim that BuyerQuest breached the Article 5 confidentiality clause of the Tradeshift Partner
 8 Program Agreement.² That is, the Court need only consider the present motion if it denies
 9 Tradeshift's Motion for Relief is denied and specifically holds that Tradeshift is precluded from
 10 pursuing its breach of the confidentiality clause theory of breach in the case. If Tradeshift's
 11 Motion for Relief is granted or if the Court holds that Tradeshift is permitted to pursue its breach
 12 of confidentiality theory in the case even if the Court denies further discovery on that issue, it
 13 need not consider the present Motion for Leave.

14 As explained in Tradeshift's pending Motion for Relief, there is no dispute that Tradeshift
 15 pled that BuyerQuest breached the contract in its original Complaint. However, in the course of
 16 ruling on a recent discovery dispute, Magistrate Hixson found that because Tradeshift had pled
 17 allegations identifying several expressly exemplary contract provisions that were breached, it is
 18 precluded from taking discovery about BuyerQuest's breach of other contract provisions that
 19 were not specifically identified in the Complaint. ECF 94 at 3-5 ("Discovery Order"); *see also*
 20 ECF 104 (Motion for Relief) at 4. As the Court is aware, Tradeshift is seeking relief (in part)
 21 from Magistrate Hixson's Order both because (1) the order is predicated on several misstatements
 22 of fact (ECF No. 104 at 4-5) and (2) the order is contrary to well-settled law that discovery is not
 23 limited to issues expressly raised in a Complaint and litigants are not required to plead every

24 ¹ Unless otherwise specified, all exhibit cites are to the Jason Yu Declaration in Support of
 25 Tradeshift's Contingent Motion for Leave to Amend.

26 ² Tradeshift identifies three contracts with BuyerQuest in the Complaint: (1) the Tradeshift
 27 Partner Program Agreement; (2) the Cross Selling Attachment; and (3) the Reseller Order Form
 28 (collectively, in the Complaint and in the present motion, "the BuyerQuest Agreements").
 29 Tradeshift's First Amended Complaint would specifically allege that BuyerQuest breached the
 30 Article 5 confidentiality clause of the Tradeshift Partner Program Agreement. Ex. A.

1 specific factual theory for each such cause of action (ECF 104 at 4) – that is the purpose of
 2 contention interrogatories and other discovery.

3 Although Discovery Order’s holding is limited to whether BuyerQuest should be
 4 compelled to provide certain additional discovery, BuyerQuest is interpreting the order to mean
 5 that Tradeshift is precluded from presenting *any* evidence of BuyerQuest’s breach of the
 6 confidentiality provision at trial (even the evidence that Tradeshift already has). If that were true,
 7 Tradeshift would be irrevocably prejudiced. Tradeshift brings this contingent Motion for Leave
 8 to Amend to ensure there is no dispute that it will be allowed to present evidence and argument
 9 regarding BuyerQuest’s breach of the confidentiality provision at trial.

10 There is no deadline to amend pleadings with leave of the court, and it is well settled that
 11 the Federal Rules establish a liberal amendment standard, instructing that a “court should freely
 12 give leave when justice so requires.” *See* Fed. R. Civ. P. 15(a)(2). Such amendment is warranted
 13 here because BuyerQuest cannot establish bad faith, prejudice, or futility related to this modest
 14 amendment, nor will the proposed amendment have any impact on the trial schedule.

15 Accordingly, Tradeshift respectfully requests that the Court grant its Motion for Leave to
 16 File the First Amended Complaint if the Court’s order on the pending Motion for Relief would
 17 preclude Tradeshift from asserting breach of the confidentiality provision at trial.

18 **II. STATEMENT OF RELEVANT FACTS**

19 **A. The Original Complaint.**

20 Tradeshift filed its Complaint against BuyerQuest for breach of contract, breach of the
 21 implied covenant of good faith and fair dealing, and tortious interference on February 20, 2020.
 22 ECF 1 (“Compl.”). The Complaint alleged that Tradeshift and third party Smucker signed a
 23 contract (the “SSA”) in June 2019 for a license to Tradeshift’s software solution and platform, a
 24 license to third party BuyerQuest’s software solution, and for certain managed services to
 25 implement the joint software solution (the “Smucker Project”). *Id.*, ¶ 9. Tradeshift also entered
 26 into a set of agreements (the Tradeshift Partner Program Agreement, the Cross Selling
 27 Attachment, and the Reseller Order Form) (collectively, the “BuyerQuest Agreements”) with
 28

1 defendant BuyerQuest which provided for Tradeshift to act as BuyerQuest's reseller on the
 2 Smucker project, established a framework for future joint endeavors between Tradeshift and
 3 BuyerQuest, and specifically established a payment and work schedule for BuyerQuest to act as
 4 Tradeshift's subcontractor in implementing the joint Tradeshift/BuyerQuest solution for the
 5 Smucker project. *Id.*, ¶¶ 12-15. Ultimately, BuyerQuest interfered with Tradeshift's SSA and
 6 breached its own obligations to Tradeshift under the BuyerQuest Agreements by misleading
 7 Smucker to believe that Tradeshift could not perform technically as required and that Tradeshift
 8 was on the brink of financial ruin. *Id.*, ¶¶ 26-27, 34-44. Smucker notified Tradeshift that it was
 9 terminating the SSA effective January 17, 2020 (*id.*, ¶ 17), resulting in Tradeshift suing
 10 BuyerQuest in the Northern District of California and Smucker in the Southern District of New
 11 York.³

12 In the present case, Tradeshift alleged that BuyerQuest (1) tortiously interfered with the
 13 SSA, (2) breached its contractual obligations in a myriad of ways under the BuyerQuest
 14 Agreements, and (3) breached its obligation of good faith and fair dealing owed to Tradeshift.
 15 *Id.*, ¶¶ 26-27. Tradeshift did not describe every act of interference or breach in the Complaint,
 16 both because it was not required to under Rule 8 of the Federal Rules of Civil Procedure's notice
 17 pleading standards and also because much of BuyerQuest's and Smucker's misconduct was
 18 covert and unknown to Tradeshift at the time of filing. Instead, Tradeshift *expressly* stated in the
 19 Complaint that it was providing non-limiting *examples* of factual allegations that would support
 20 its breach and interference claims, including, specifically by identifying a handful of exemplary
 21 contractual provisions that were alleged to have been breached. *See e.g., id.*, ¶ 31 ("BuyerQuest
 22 has materially breached the BuyerQuest Agreements on multiple occasions, *including . . . by, for*
 23 *example*, failing to obtain Tradeshift's review and consent to scope changes to the Smucker
 24 project; interfering with Tradeshift's program management duties; failing to support Tradeshift

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 26 ³ Tradeshift was forced to sue BuyerQuest and Smucker in two different jurisdictions even
 27 though the underlying facts of the two cases are related because the BuyerQuest Agreements
 specified the Northern District of California as the venue whereas the SSA specified the Southern
 District of New York as the venue. ECF 1, ¶ 4 and Complaint, ¶ 4, *Tradeshift, Inc. v. Smucker*
Services Co., Case No. 1:20-cv-3661 (S.D.N.Y.), ECF 1.

1 with planning, configurations, deliverables, integrations, change requests, and product updates
 2 necessary for the Smucker project implementation; failing to follow Tradeshift's lead with respect
 3 to supplier onboarding strategy and planning; failing to follow the Change Control Process; and
 4 failing to include Tradeshift in communications with Smucker related to the Smucker project.”)
 5 (emphasis added).

6 Notably, at the time of filing the original Complaint, Tradeshift was not aware (and had no
 7 way to know) that BuyerQuest had secretly used Tradeshift's confidential specifications and
 8 design documents to identify new technical features and functionality that it would need to
 9 incorporate into its own product roadmap in order to steal the Smucker business away from
 10 Tradeshift.

11 **B. Tradeshift Uncovers BuyerQuest's Breach of the Article 5 Confidentiality**
 12 **Provision**

13 In July 2020, BuyerQuest produced a Tradeshift technical specification (the “Solution
 14 Description Document”) describing Tradeshift’s solution for the Smucker project from the files of
 15 BuyerQuest’s Chief Product Officer, Salman Siddiqui. During his April 2021 deposition,
 16 however, Mr. Siddiqui’s testified that he had no involvement in BuyerQuest’s work on the
 17 Tradeshift/BuyerQuest project for Smucker and therefore confirmed he had no legitimate basis to
 18 have Tradeshift’s Solution Description Document.⁴ Ex. E (Siddiqui Dep. Tr.) at 20:6-22:4; *see also* Ex. F (Utyuzh Dep. Tr.) at 19:15-18, 20:18-21, 38:21-39:2.

19 Mr. Siddiqui further explained that his job was to “roadmap” new features to add to
 20 BuyerQuest’s products and, in fact, *at the time he requested Tradeshift’s confidential documents*
 21 *from Dan Utyuzh* (BuyerQuest’s Project Manager on the Smucker project), he was developing a
 22 plan to add features to BuyerQuest’s procurement solution that would replicate and replace the
 23 functionality of Tradeshift’s procurement solution so BuyerQuest could replace Tradeshift on the
 24 Smucker Project entirely. Ex. E at 17:17-18:11, 19:9-24, 72:22-73:15, 74:16-75:13.⁵ Mr.
 25

26 ⁴ Prior to Mr. Siddiqui’s testimony that he had no role on the Smucker Project, there was no
 27 reason to suspect there was anything wrong with Mr. Siddiqui having a copy of the SDD.

28 ⁵ Mr. Utyuzh testified that he did not know why Mr. Siddiqui needed Tradeshift’s confidential
 29 documents at the time he provided them to Siddiqui (*see e.g.*, Ex. F (Utyuzh Dep. Tr.) at 107:7-22,

1 Siddiqui testified that BuyerQuest then presented the plan to Smucker at a January 7, 2020 in-
 2 person meeting, which caused Smucker to terminate Tradeshift ten days later. *Id.* at 81:12-20.

3 **C. Tradeshift Discusses Breach of Confidentiality Provision with BuyerQuest.**

4 The day after Mr. Siddiqui's deposition, Tradeshift wrote BuyerQuest about certain
 5 deficiencies in BuyerQuest's document production and expressly stated that the documents that
 6 BuyerQuest owed Tradeshift would likely also be relevant to proving BuyerQuest's breach of the
 7 Confidentiality Provision. Ex. B at 2 (4/9/2021 J. Yu Email). During that same discussion,
 8 Tradeshift also explained that "Tradeshift was not aware of BuyerQuest's use of its confidential
 9 information at the time it filed the complaint, but it is clear now that BuyerQuest breached its
 10 confidentiality obligations under the parties agreement by misusing confidential information.
 11 Tradeshift intends to prove as much at trial." *Id.* at 1-2 (4/12/2021 A. Phillips Email and
 12 4/13/2021 J. Yu Email). To avoid all doubt, Tradeshift served a supplemental interrogatory
 13 response identifying BuyerQuest's breach of the Article 5 confidentiality clause (the
 14 "Confidentiality Provision") through Mr. Siddiqui's improper use of Tradeshift's Solution
 15 Description Document as an example of its breach of contract, breach of good faith and fair
 16 dealing, and wrongful conduct underlying an interference claim. Ex. C (4/20/2021 Tradeshift
 17 Supp. Res. to Interrog. No. 19).

18 **III. LEGAL STANDARD**

19 Federal Rule of Civil Procedure 15(a) provides that a party may amend any pleading by
 20 moving for leave of court and instructs that leave to amend "shall be freely given." *Foman v.*
 21 *Davis*, 371 U.S. 178, 182 (1962). In the Ninth Circuit this policy is "applied with extreme
 22 liberality." *Owens v. Kaiser Found. Health Plan, Inc.*, 244 F.3d 708, 712 (9th Cir. 2001) (citation
 23 omitted) (granting motion for leave to amend answer where defendant moved to amend
 24 immediately upon discovering the availability of the res judicata affirmative defense).

25 Courts consider five factors in determining whether leave to amend is warranted: (i) undue
 26

27 109:6-110:19, 113:7-17, 116:6-117:7), a questionable claim given that Mr. Utyuzh knew that
 28 BuyerQuest was actively working to interfere with the SSA to get the Smucker Project for itself.

1 delay; (ii) prejudice to the opposing party; (iii) futility of the amendment; (iv) bad faith; and (v)
 2 whether the moving party has previously amended its pleadings. *Foman*, 371 U.S. at 182. When
 3 conducting this analysis, all inferences should be drawn in favor of the granting motion. *See*
 4 *Griggs v. Pace Am. Grp., Inc.*, 170 F.3d 877, 880 (9th Cir.1999) (reversing district's court denial
 5 of motion to amend upon determining that the amendment was not futile and not made in bad
 6 faith).

7 The non-moving party has the burden to demonstrate that leave should not be granted.
 8 *Rambus, Inc. v. STMicroelectronics N.V.*, No. C 10-05449, 2013 WL 12343708, at *2 (N.D. Cal.
 9 Mar. 18, 2013) (Seeborg, J.) (“Federal Rule of Civil Procedure 15 places the burden of
 10 establishing a basis for denying leave to amend on [the] nonmoving party . . .”). As established
 11 below, granting leave to amend is warranted here.

12 **IV. ARGUMENT**

13 The Court should grant Tradeshift leave to amend here. Tradeshift asserted a claim for
 14 breach of contract in its original Complaint and timely disclosed specific facts regarding
 15 BuyerQuest’s breach of the Confidentiality Provision of that contract during discovery (through
 16 conferral and in a formal interrogatory response) immediately upon learning of them. Under
 17 established notice pleading rules, and because Tradeshift timely disclosed the confidentiality
 18 breach theory in discovery, Tradeshift believes it already is entitled to present evidence of this
 19 breach at trial. ECF 104 *passim*. However, because BuyerQuest has argued that the magistrate’s
 20 Discovery Order limits the evidence and argument Tradeshift can present at trial,⁶ Tradeshift
 21 seeks leave to file the First Amended Complaint to expressly add allegations specifying that
 22 BuyerQuest breached the Confidentiality Provision. For the reasons below, the Court should
 23 grant Tradeshift the requested leave to file the First Amended Complaint.

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 26 ⁶ Tradeshift disputes the idea that the Court’s Discovery Order precludes Tradeshift from
 27 introducing evidence that BuyerQuest breached the Confidentiality provision – the Order itself
 28 holds only that BuyerQuest was not obligated to provide certain additional discovery. It says
 nothing about what evidence Tradeshift may introduce at trial. Tradeshift nonetheless brings this
 motion out of an abundance of caution given BuyerQuest’s apparent interpretation.

1 **A. Tradeshift's Proposed Amendment Is Not Prejudicial**

2 The party opposing the amendment bears the burden of establishing prejudice. *DCD*
 3 *Programs, Ltd. v. Leighton*, 833 F.2d 183, 187 (9th Cir. 1987). Prejudice measures whether the
 4 proposed amendment constitutes a “radical shift” in the direction or scope of the case. *Wroth v.*
 5 *City of Rohnert Park*, No. 17-CV-05339-JST, 2018 WL 6439120, at *3 (N.D. Cal. Dec. 7, 2018)
 6 (finding that adding a new but related theory of liability would not cause a “radical shift,” even
 7 though discovery had closed because plaintiff was not seeking additional discovery and agreed to
 8 stipulate to the reopening of discovery should it be required by Defendants).

9 Here, BuyerQuest cannot show prejudice because Tradeshift broadly pled breach of the
 10 BuyerQuest Agreements in the Complaint and because Tradeshift promptly disclosed specific
 11 facts regarding breach of the Confidentiality Provision during fact discovery, both through
 12 correspondence with BuyerQuest’s counsel and in a formal interrogatory response. Exs. B & C.

13 Moreover, the fact that BuyerQuest misused Tradeshift’s confidential documents has
 14 always been known to BuyerQuest because (1) it was BuyerQuest’s own employee, Mr. Siddiqui
 15 who used the documents and (2) BuyerQuest knew the entire time that Mr. Siddiqui had no role
 16 in the implementation of the Smucker Project and should not have asked for, received, or used
 17 those documents. Tradeshift, in contrast, only discovered this during Mr. Siddiqui’s and Mr.
 18 Utyuzh’s depositions. Tradeshift could not have known of BuyerQuest’s breach of the
 19 Confidentiality Provision at the time the Complaint was filed because BuyerQuest had
 20 intentionally hidden that fact from Tradeshift after covertly accessing the Solution Description
 21 Document for what BuyerQuest knew was an improper purpose, namely, to interfere with the
 22 SSA and take over Tradeshift’s contract with Smucker for itself. On these facts, BuyerQuest
 23 cannot be heard to argue prejudice.

24 Nor can BuyerQuest argue prejudice on the grounds that the amendment will result in it
 25 having to produce additional discovery. Fact discovery is closed, and the only open discovery
 26 issue is that which is the subject of Tradeshift’s pending Motion for Relief. Allowing Tradeshift
 27 leave to file the First Amended Complaint therefore adds no new discovery burdens and is not

1 prejudicial.⁷ See e.g., *Optrics Inc. v. Barracuda Networks Inc.*, No. 17-cv-04977-RS, 2020 WL
 2 8680000, at *2 (N.D. Cal. June 11, 2020) (granting a motion to amend the complaint at a late
 3 stage in a proceeding even where additional limited discovery may be required).

4 Likewise, to the extent that BuyerQuest might argue that it is entitled to additional
 5 discovery to refute Tradeshift's new theory, such claims are hollow. Because the facts related to
 6 BuyerQuest's breach were always known to BuyerQuest, it should have known this issue would
 7 come up. Moreover, at the time of Mr. Siddiqui's deposition and the parties' subsequent
 8 conferrals discussing the issue (Ex. B), BuyerQuest had only deposed a single witness.
 9 Accordingly, BuyerQuest had the opportunity to question numerous witnesses about this issue
 10 after Tradeshift disclosed it and, in fact, *did* investigate Tradeshift's breach of the Confidentiality
 11 Provision claim. For example, BuyerQuest questioned Tradeshift witnesses about the Solution
 12 Description Document, including who drafted it, its purpose, and who reviewed and approved it
 13 and about Tradeshift's confidentiality practices. Ex. G (S. Norton Tr.) at 31:21-34:18 and Ex. H
 14 (D. Gillman Tr.) at 106:10-107:4. Courts have refused to find prejudice or deny leave to amend
 15 on similar facts. *Ur-Rahman v. RadioShack Corp.*, No. C-07-04427 RMW, 2008 WL 2949273,
 16 at *2 (N.D. Cal. July 25, 2008) (Whyte, J.) ("The court has no sympathy for this argument. Prior
 17 to taking any depositions, RadioShack knew Ms. Ur-Rahman sought to amend her complaint and
 18 refused to respond to her request. Nevertheless, RadioShack could have explored these topics in
 19 the depositions.").

20 Indeed, whereas is the case here, if the amendment does not "substantially alter the nature
 21 of the litigation or require significant additional discovery or cause substantial delay," courts
 22 generally grant the motion. *Beecham v. City of W. Sacramento*, No. 2:07-CV-01115 JAM EFB,
 23 2008 WL 3928231, at *2-3 (E.D. Cal. Aug. 25, 2008) (granting motion to amend brought two
 24

25 ⁷ Tradeshift believes that BuyerQuest should be ordered to produce the discovery that is the
 26 subject of the Motion for Relief (ECF 104) and it is possible that Tradeshift will petition for
 27 additional relevant discovery if/after it has had the opportunity to review that production.
 28 However, Tradeshift is not willing to forego the current November 1, 2021 trial date to get such
 potential additional discovery and instead is prepared to prove BuyerQuest's breach of the
 Confidentiality Provision based only on the current evidence of record if necessary.

1 weeks before the close of discovery to add a new party upon finding that the defendants made no
 2 showing of prejudice, futility or bad faith); *Gonzalez v. Wilmington Tr., NA*, No. 15CV1565 AJB
 3 (JLB), 2016 WL 4542027, at *5-6 (S.D. Cal. June 15, 2016) (granting motion to amend despite
 4 “some prejudice,” where the amendments would not cause the defendants to undertake “an
 5 entirely new course of defense”) (citation omitted).

6 In contrast, Tradeshift will be severely prejudiced if its Motion for Relief and the present
 7 motion are both denied. Tradeshift would have to initiate an entirely new lawsuit and separately
 8 pursue a claim for breach of the Confidentiality Provision, potentially at risk of being precluded
 9 from ever pursing this claim. On these facts, the potential for prejudice heavily weighs in favor
 10 exclusively of Tradeshift.

11 **B. Tradeshift Has Not Delayed or Acted in Bad Faith.**

12 Tradeshift has not delayed or acted in bad faith. “There is no undue delay where . . . a
 13 party acts diligently by moving to amend to plead new facts promptly after learning of them.”
 14 *Rambus*, 2013 WL 12343708, at *6; *see also Acre v. Valley Prune, LLC*, 3 F. Supp. 3d 794, 799
 15 (E.D. Cal. 2014) (finding that waiting two months after obtaining a declaration that gave rise to
 16 new facts before moving to amend was reasonable); *Ur-Rahman*, 2008 WL 2949273, at *2
 17 (granting to motion to amend even where the plaintiff waited ten months between discovering
 18 basis for amendment and amending).

19 As soon as Tradeshift obtained Mr. Siddiqui’s testimony showing that BuyerQuest had
 20 improperly (and covertly) used Tradeshift’s confidential information, it promptly informed
 21 BuyerQuest in an email to counsel. Ex. B (April 9 to April 13 email chain). Tradeshift also
 22 served an interrogatory response expressly disclosing facts related to the breach (which, again,
 23 were already known to BuyerQuest). Ex. C (4/20/2021 Tradeshift Supp. Res. to Interrog. No.
 24 19). Because Tradeshift had already asserted a claim for breach of the BuyerQuest Agreements,
 25 it did not believe that it needed to amend its Complaint. Nonetheless, following the Discovery
 26 Order and the Court’s decision to consider Tradeshift’s Motion for Relief, Tradeshift worked
 27 diligently to file this motion as a backstop in the event its Motion for Relief was denied.

1 Referring to a Slack thread showing Mr. Utyuzh and Mr. Siddiqui exchanging
 2 Tradeshift's confidential documents, BuyerQuest has previously argued that Tradeshift should
 3 have been able to surmise a breach of the Confidentiality Provision several months earlier than it
 4 did. But those Slack messages merely showed Tradeshift documents—which related to the
 5 project on which the parties were jointly working—being circulated between two BuyerQuest
 6 employees; they did not show why they were being circulated or suggest that there was an
 7 improper purpose in doing so. Nor was it evident from those messages that Mr. Siddiqui had no
 8 role in the implementation of the Smucker Project and no legitimate purpose for receiving or
 9 using those documents. Ex. E at 17:17-18:11, 19:9-24, 72:22-73:15, 74:16-75:13. And, in any
 10 event, Courts recognize that waiting to amend until after the party has obtained sufficient
 11 evidence to support its proposed amendments is a satisfactory explanation that cuts against a
 12 finding of delay. *DCD Programs*, 833 F.2d at 187 (finding no evidence of unjust delay where the
 13 plaintiff waited to amend until it had sufficient evidence of defendant's wrongful conduct).

14 Because much of BuyerQuest's misconduct against Tradeshift was clandestine, Tradeshift
 15 had very little information about BuyerQuest's wrongdoing at the outset of the case. But bit by
 16 bit, and in many instances having to file discovery motions to get at what was clearly relevant
 17 information, Tradeshift extracted evidence of BuyerQuest's charade and the full extent of its
 18 wrongdoing. *See* Exs. C and D. Any delay or bad faith on these facts is not attributable to
 19 Tradeshift.

20 **C. Amendment of the Complaint Would Not Be Futile**

21 Tradeshift's proposed amendments are not futile. Courts use the same Rule 12(b)(6)
 22 standard to determine whether an amendment would be futile—*i.e.*, determining whether the
 23 amended pleading alleges facts that state a claim for relief. *See Miller v. Rykoff-Sexton, Inc*, 845
 24 F.2d 209, 214 (9th Cir. 1988). BuyerQuest has not argued that Tradeshift's amendment would be
 25 futile and, in fact, this Court denied BuyerQuest's earlier motion to dismiss. ECF No. 29.
 26 Tradeshift's proposed First Amended Complaint repeats the claim for breach of the BuyerQuest
 27 Agreements in its original Complaint but adds a new paragraph to specifically allege that

1 BuyerQuest breached the Confidentiality Provision by using Tradeshift's confidential documents
 2 for an unauthorized purpose, namely, to harm Tradeshift and steal the Smucker work for itself.
 3 Ex. A at ¶¶ 28-29. Accordingly, just as the Court decided with respect to Tradeshift's original
 4 Complaint, the proposed First Amended Complaint adequately states a claim for breach of the
 5 BuyerQuest Agreements.

6 **D. Tradeshift Has Not Previously Amended Its Complaint**

7 Where a party has previously been granted leave to amend, Courts are more likely to deny
 8 a subsequent request. *Genthner v. Naeni*, No. 1:17-CV-00290-DAD-SAB, 2017 WL 3421943, at
 9 *5 (E.D. Cal. Aug. 9, 2017) (denying further leave to amend for a *fourth* time); *Gilbert Unified*
 10 *Sch. Dist. No. 41 v. CrossPointe, LLC*, No. CV 11-00510-PHX-NVW, 2012 WL 1564660, at *6
 11 (D. Ariz. May 2, 2012) (where the party has had multiple opportunities to amend, the discretion
 12 to deny leave to amend is broad). This is Tradeshift's *first amendment* to its complaint.
 13 Accordingly, this factor weighs in favor of granting leave to amend.

14 **V. CONCLUSION**

15 Because the risk of prejudice to Tradeshift is so severe should it be precluded from
 16 advancing the evidence of record that shows that BuyerQuest breached Article 5 of the Master
 17 Agreement for the Tradeshift Partner Program, Tradeshift has taken the extraordinary step of
 18 submitting this Motion for Leave to File the First Amended Complaint. Tradeshift submits that
 19 the Court need not rule on the present motion unless the Court's order on the Motion for Relief
 20 finds that Tradeshift is precluded from advancing such a theory of breach because it was not
 21 expressly pled in the Complaint. If such an order issues, Tradeshift respectfully submits that its
 22 Motion for Leave readily meets the requirements for being granted. For the foregoing reasons,
 23 the Court should grant Tradeshift's Motion for Leave to Amend the Complaint.

24 Dated: July 1, 2021

ORRICK, HERRINGTON & SUTCLIFFE LLP

25 /s/ Amy K. Van Zant

26 AMY K. VAN ZANT

27 Attorneys for Plaintiff
 28 TRADESHIFT, INC.

PLAINTIFF'S CONTINGENT
 MTN FOR LEAVE TO FILE
 FIRST AMENDED COMPLAINT
 CASE No. 3:20-cv-1294-RS